No. 96-511

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JANET RENO,
Attorney General of the United States, *et al.*,
Appellants,
v.
AMERICAN CIVIL LIBERTIES UNION, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

BRIEF OF AMICI CURIAE ASSOCIATION OF NATIONAL ADVERTISERS, INC. AND THE MEDIA INSTITUTE IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST [1]

Amici have a long history of advocacy in this Court for strong First Amendment protection for facilitating speech and communications in our society, particularly truthful,

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[1] Pursuant to Rule 37 of this Court's Rules, the parties have consented to the filing of this brief in letters that have been filed with the Clerk.

nonmisleading commercial messages for lawful products and services. Although this case concerns indecent speech, the arguments raised by the government pose a substantial threat to First Amendment values fostering commercial speech as well. The government attempts to justify the censorship legislated by the Communications Decency Act of 1996 (the "CDA")[2] as being necessary for the protection of children. That same interest is routinely offered as a justification for restricting commercial speech. In this brief, *amici* explain why a government's legitimate interest in our nation's children should not reduce First Amendment protection for any category of speech, and certainly not for commercial speech.

The Association of National Advertisers, Inc. ("ANA"), the advertising industry's oldest trade association, is the only organization exclusively dedicated to enhancing the ability of business to advertise on a national and regional basis. With more than 5,000 subsidiaries, divisions and operating units, ANA members market a kaleidoscopic array of goods and services and account for a significant percentage of the nation's annual national and regional advertising expenditures. As the nation's principal community of commercial speakers, ANA has long been committed to the advancement of truthful commercial speech designed to permit consumers to make informed and autonomous choices in the marketplace among lawful products and services.

The Media Institute is an independent, non-profit research organization. Through conferences, publications, and filings with courts and regulatory bodies, the Institute advocates a strong First Amendment and competition within the communications industry. The Institute's First Amendment advocacy is not limited to commercial speech issues, and is unrelated to the financial or proprietary interests of any private-party participants.

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[2] The CDA was enacted as Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 501, 110 Stat. 56, 133-35, and will be codified at 47 U.S.C. § 223(a)-(h).

SUMMARY OF ARGUMENT

The government attempts to justify the CDA's restrictions on fully protected speech as necessary to prevent harm to children. Without acknowledging its First Amendment burden of proof, the government claims that the CDA would reduce the supposed harm caused to children by the availability of indecent speech on the Internet, and that alternatives to censorship would not address the purported problem with equal effectiveness. At the heart of the government's argument is a most troubling contention—that the assertion of an interest in the protection of children somehow diminishes First Amendment rights.

To the contrary, regardless of the compelling nature of the interest asserted by a government, its laws must withstand an undiluted degree of constitutional scrutiny. Government may have a compelling interest in shielding children from certain messages, but when pursuit of that interest simultaneously restricts the freedom of adults to communicate, this Court repeatedly has rejected the notion that adults may be reduced to reading only what is fit for children. Instead of allowing adults to be deprived of fully protected speech, the federal constitution entrusts parents,[3] not government, with the right and duty to decide whether and how to permit their children to have access to mature materials. The government can act in these areas only when it proves that parental responsibility and supervision would be clearly ineffective and, even then, the government must act in a narrowly tailored manner that will accomplish a compelling governmental end.

Based on its asserted interest in protecting children, the government argues that the CDA should be upheld as a content-neutral restriction on speech. But the CDA, by its express language, applies solely to speech with inde-

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[3] The word "parents" and its variants as used in this brief include other types of guardians of children.

cent content and so must be subjected to the more rigorous scrutiny applicable to content-based bans. For example, advertising that, based on its content, arguably falls within the CDA's overly broad and imprecise definition of indecency must not be restricted unless the government meets in full the burdens imposed by the *Central Hudson* test.[4] More significantly, the government's argument in this case for reduced First Amendment scrutiny, if accepted, could have a devastating impact on non-indecent advertising for adult products and services. A government that seeks to restrict such speech, whatever its true motivation, would need only to assert a goal of promoting child welfare, and adults could easily lose numerous avenues for self-expression and receipt of information. The government's attempt to squeeze the CDA into the category of content-neutral restrictions should be rejected as a matter of logic and First Amendment jurisprudence.

Several of the government's other arguments also could apply beyond the category of indecent speech, to all speech which relates to activities that may be engaged in lawfully by adults, but not children. Again, at risk are the rights of commercial speakers and their audience to communicate about adult products. Commercial speech, however, raises very different issues of proof for government than does indecent speech. For example, government typically argues that indecent speech harms children immediately upon their exposure to it, but no such argument can be made as to non-indecent commercial speech. Because of this distinction and others discussed below,

[4] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). Many traditional and widely disseminated advertisements might be argued to fall within the CDA's sweeping definition of indecency, which the court below held was unconstitutionally vague. *See* J.S. App. 80a (Sloviter, J.); 84a-85a (Buckwalter, J.). Potentially banned by the CDA, for example, are certain popular and effective advertisements for jeans, underwear and perfume.

amici respectfully urge the Court to consider the precedential impact of its decision on commercial speech rights and avoid using language that might be construed as diminishing those rights where protection of children is involved.

ARGUMENT

I. THE FIRST AMENDMENT APPLIES WITH NO LESS FORCE WHEN THE GOVERNMENT'S ASSERTED JUSTIFICATION FOR CENSORSHIP IS THE PROTECTION OF CHILDREN

A. First Amendment Rights Are Not Diminished Based on the Nature of the Government's Asserted Purpose for Restricting Speech

The apparently good intentions of government do not give it greater latitude to act as a censor. Rather, defenders of speech must never allow their sympathy for a government's goal to lull them into relaxed vigilance. This principle has guided the decisions of this Court, which serves as the bulwark of the First Amendment. Time and again, members of the Court have quoted the warning of Justice Brandeis:

> Experience should teach us to be most on guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

Today, would-be regulators of speech routinely attempt to dress up censorship in the cloak of protection of children. Many such restrictions, covering a wide range of products and services, are currently under attack in the courts, regulatory bodies and legislatures, including the CDA itself—all purportedly proposed in the name of

protecting children. Few would disagree with the goals that government seeks to advance with these proposals, although many question the efficacy of achieving these goals through censorship, rather than regulation of conduct or greater deference to the parental role.

More important, the popularity of a government's goal does not provide greater leeway for achieving that goal through censorship. The First Amendment "directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that government may use to achieve its ends." *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1512 (1996) (Stevens, J., principal opinion). As a unanimous Court recently stated,

> [w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.

Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 115 S. Ct. 2338, 2350 (1995).

B. This Court Repeatedly Has Held that a Legislature's Asserted Interest in Protecting Children Cannot Trump First Amendment Rights

This is not the first case, nor likely will it be the last, that presents a conflict between First Amendment rights and a government's claim that it must restrict those rights in order to protect children. In contemporary society, where adults and minors are often exposed to the same media, it is difficult to keep communications away from children without simultaneously restricting the rights of adults to communicate with one another. As the government acknowledges, this case presents precisely that conflict: "in the short run, the CDA may impose some burdens and costs on adult-to-adult communication of indecent material." Appellants' Brief at 19. What the government does not acknowledge, however, is that this Court consistently has resolved that conflict in favor of protecting speech. *See Sable Communications of Calif., Inc. v. F.C.C.*, 492 U.S. 115 (1989); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *Butler v. Michigan*, 352 U.S. 380 (1957).

In *Butler*, the Court invalidated Michigan's prohibition on the sale of materials "tending to incite minors to violent or depraved or immoral acts, [or] manifestly tending to the corruption of the morals of youth . . . ." 352 U.S. at 381. The Court held that the challenged law impermissibly "reduce[d] the adult population of Michigan to reading only what is fit for children." *Id.* at 383. It added, "[s]urely, this is to burn the house to roast the pig." *Id.*

In *Bolger*, the Court relied on *Butler* to strike down as unconstitutional a federal statute that prohibited the mailing of unsolicited advertisements for contraceptives. *Bolger*, 463 U.S. at 73-74. Noting that the unsolicited advertisements were "entirely suitable for adults," the Court invalidated the statute as an impermissible restriction on commercial speech. *Id.*

This principle again was applied to a restriction on indecent speech in *Sable*. At issue was a federal ban on, *inter alia*, indecent commercial telephone messages, commonly known as "dial-a-porn." After recognizing the government's compelling interest in protecting children, the Court made plain that this interest cannot diminish the free speech rights of adults:

> The Government may serve this legitimate interest, but to withstand constitutional scrutiny, it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. . . . It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends.

492 U.S. at 126 (citations omitted). In reliance on *Butler* and *Bolger*, the Court struck down the ban because it "has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear." *Id.* at 131. *See also Denver Area Educ. Telecomm. Consortium v. F.C.C.*, 116 S. Ct. 2374, 2393 (1996) (citations omitted) (noting that "[n]o provision, we concede, short of an absolute ban, can offer certain protection against assault by a determined child," and affirming that the Court has " 'not, however, generally allowed this fact alone to justify reduc[ing] the adult population . . . to [viewing] only what is fit for children.' "); *id.* at 2416-17 (Kennedy & Ginsburg, J.J., concurring in part and dissenting in part) (same).

The three-judge court below correctly concluded that *Sable* requires invalidation of the CDA. As set forth in the court's Findings of Fact, a "wealth of persuasive evidence" proved that compliance with the CDA is "either technologically impossible or economically prohibitive . . . without seriously impeding [the] posting of on-line material which adults have a constitutional right to access." J.S. App. 73a. This Court, by affirming the judgment below, should add this case to the line of precedents that protect mature speech from a paternalistic government that claims it must censor for the sake of children.

The government misleadingly suggests that the decision in *Sable* depended upon the fact that the restriction on "dial-a-porn" operated as a flat ban. Appellants' Brief at 27, 38. *Sable* does not contain any suggestion that a less than complete ban somehow would escape First Amendment scrutiny. Indeed, *Sable* relied on *Bolger* which invalidated a restriction on the mailing of *unsolicited* advertisements for contraceptives, but had no effect on *solicited* advertisements, and clearly was not a complete ban. *Bolger*, 463 U.S. at 61-62. If the partial nature of the ban in *Bolger* had no impact on the outcome in that

commercial speech case, then it must be irrelevant in the context of the CDA's restrictions on fully protected speech. More important, First Amendment rights would be injured if strict scrutiny were avoided whenever a content-based restriction on speech could be characterized as less than complete, just as surely as they are when a restriction's duration is claimed to be tolerable. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury").[5]

The government also mistakenly attempts to avoid the rule of *Butler*, *Bolger*, and *Sable* by relying on this Court's inapposite decision in *Ginsberg v. New York*, 390 U.S. 629 (1968). In *Ginsberg*, the defendant owner of a stationery store who sold an indecent magazine to a 16-year-old boy did not suggest that New York's ban on such sales to youths under the age of 17 affected his ability to sell to adults, and clearly it did not. *Id.* at 634. Thus, *Ginsberg* concerned solely New York's exercise of its police power to protect minors under 17, not, as here, a conflict between that police power and the First Amendment rights of adults. The criminal statute in *Ginsberg* could be and was upheld based on mere rational basis review. *Id.* at 643.

In contrast to the criminal statute at issue in *Ginsberg*, the CDA does impede constitutionally protected com-

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[5] In focusing on whether the CDA is a flat ban, the government appears to be confusing the strict scrutiny test, applicable to content-based restrictions, with the test applicable to content-neutral restrictions. The latter test does inquire as to whether the restriction "leave[s] open ample alternative channels of communication." *See, e.g., United States v. Grace*, 461 U.S. 171, 177 (1983) (citation omitted). As discussed more fully below, however, the government cannot successfully maintain that the CDA, which restricts a certain category of fully protected speech based on its indecent content, is content-neutral and subject to this reduced First Amendment protection.

munications between adults. Unlike the sale of magazines at a stationery store, or the sale of tickets at an adult movie theater, the communication of indecent materials over the Internet does not involve discrete face-to-face exchanges. As the district court held, the speaker on the Internet lacks an economically or technologically feasible means to ensure that his audience does not include persons under the age of eighteen. J.S. App. 73a-74a. Consequently, to guarantee compliance with the CDA, the speaker would be forced to abandon or constrict his communications with the entire audience, including those adults for whom indecent messages are fully protected speech. *Butler, Bolger* and *Sable* prohibit such an abridgment of speech.

This Court's admonition against burning down the house to roast the pig applies with special vigor when the "house" in question is the Internet. This newly-constructed medium, although private, is open to all Americans. Once a speaker enters the Internet, he or she will find a vast interactive community, estimated today at 40 million and expected to grow to 200 million by 1999. J.S. App. 13a. The pervasiveness and accessibility of a medium such as the Internet, characteristics that the government identifies as supporting greater censorship, in fact justify rigorous First Amendment protection. *See* Appellants' Brief at 35-36. The constitutional rights of adults to communicate with one another must be especially free in those media that allow for the most effective communications.

C. The Federal Constitution Entrusts Parents, Not Government, with the Primary Responsibility of Supervising the Exposure of Children to Various Types of Speech

Admittedly, the First Amendment's protection of adult-to-adult communications does increase the opportunities for children to be exposed to such messages. The possi-

bility of exposure should not, however, be viewed negatively, as a "price that we pay" for freedom of speech. Rather, by limiting governmental censorship, the constitution recognizes that parents have both the right and duty to decide whether and how to expose their children to mature messages.

This Court repeatedly has emphasized the preeminent role of parents in the making of child-rearing decisions. More than 70 years ago, the Court recognized that the "liberty" interest guaranteed under the Fourteenth Amendment includes the right of adults to "establish a home and bring up children." *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923) (invalidating Nebraska's law that prohibited the teaching in school of any modern language other than English to any child below the ninth grade). Soon thereafter, the Court more explicitly recognized the "liberty of parents and guardians to direct the upbringing and education of children under their control." *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary,* 268 U.S. 510, 534-35 (1925) (invalidating an Oregon statute requiring all children between ages 8 and 16 to attend public school). The Court added in *Pierce* that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

The principles announced in *Meyer* and *Pierce* have been quoted and expanded on in more recent cases. In *Wisconsin v. Yoder,* 406 U.S. 205 (1972), the Court held that the First and Fourteenth Amendments prevent the state from compelling Amish parents to force their children to attend formal high school to age 16. The Court stated that "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society." *Id.* at 213-14. Similarly, in *Carey v. Popula-*

tion Services International, 431 U.S. 678 (1977), the Court invalidated New York's statute prohibiting, *inter alia*, the sale of contraceptives to anyone under 16, ruling that "[t]he State points to no interest of sufficient magnitude to justify this direct interference with the parental guidance that is especially appropriate in this sensitive area of child development." *Id.* at 708.

The most expansive statement of the reasons underlying the preeminent role of parents appears in *Parham v. J.R.*, 442 U.S. 584 (1979), where the Court upheld Georgia's statute that allowed parents voluntarily to place their children in mental hospitals:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Id. at 602. This Court's consistent recognition of the preeminent role of parents militates against the constitutionality of provisions, such as the CDA, that take child-rearing decisions out of the hands of parents and place them in the hands of a censoring government.

The proper role of government in this sensitive constitutional area is to support parents in their decision-making, not to supplant them by decreeing what children may see and hear. For example, government may encourage the development of technology or voluntary ratings that will give parents the tools to decide which, if any, indecent materials they will allow their children to receive. Indeed, government must utilize these non-censorship alternatives before it constitutionally can restrict speech. *See*

Sable, 492 U.S. at 126 (government must adopt "least restrictive means" to promote its interest). Even without governmental encouragement, however, the private sector undoubtedly will create the supportive technology that parents want. The district court found that the free market system already is working: "[d]espite its limitations, currently available user-based software suggests that a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be widely available." J.S. App. 42a; *see Shea v. Reno*, 930 F. Supp. 916, 931-34 (S.D.N.Y. 1996).

The protection of parents' child-rearing rights in the area of indecent speech is consistent with the value accorded such speech in the First Amendment hierarchy. At least for adults, indecent materials are fully protected speech. Under the broad definition of indecency in the CDA, "a work need not appeal to the prurient interest or lack serious value to be 'indecent.'" *Shea*, 930 F. Supp. at 935 n.34 (citations omitted); *see* J.S. App. 70a-71a. Enforcement of the CDA would deny to parents the option of allowing their children, including those as old as 17, unrestricted access to materials that may have serious literary, artistic, political or scientific value. Government is simply not in a position to make that decision for the millions of young people across the nation, who are at various stages of maturity and whose parents have widely divergent views of the effects of exposure to indecent speech. Under the law, government may not assume the parental role and responsibilities when parents themselves have the capacity to protect their children.

By affirming the district court's decision, this Court not only will protect the First Amendment freedoms of adults, but also will reinforce the rights of parents to make basic child-rearing decisions without governmental interference masquerading as support.

II. GOVERNMENT MAY NOT TRANSFORM A CONTENT-BASED RESTRICTION ON SPEECH INTO A CONTENT-NEUTRAL RESTRICTION BY CLAIMING TO BE PROTECTING CHILDREN

In an argument with wide-ranging implications, the government contends that its asserted interest in protecting children substantially reduces the level of First Amendment scrutiny to be applied to the CDA. That interest, the government believes, allows it to evade the strict scrutiny applicable to content-based restrictions on fully protected speech, and instead to defend the CDA under the far less protective test applicable to content-neutral restrictions. The government's argument must be rejected.

The First Amendment serves fundamental national interests by treating content-based restrictions on speech as anathema:

> To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."

Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972) (citation omitted). As Judge Learned Hand once observed, the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

For these reasons, the courts apply the strictest level of scrutiny to content-based restrictions on speech. In contrast, content-neutral restrictions may be upheld if they merely serve a significant governmental interest and leave open ample alternative channels for communication of the information. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). The two different tests are appropriate because of the distinct dangers raised by content-based restrictions. When the government discriminates based on content, the dangers are a majoritarian suppression of disfavored or less popular ideas and a resulting distortion of the national debate through which the best ideas should prevail. A content-neutral regulation, however, does not implicate these concerns.

The CDA poses the very dangers that require strict scrutiny of a governmental restriction on speech. The legislators unabashedly proclaimed that they were supporting the CDA because they and some of their constituents do not like the content of indecent speech. Congress wanted to make the Internet "even bigger, and . . . even better, . . . but not for raunchy pornography that would turn most people off." 141 Cong. Rec. S8339-S8340 (daily ed. June 14, 1995) (remarks of Sen. Exon). Passage of the CDA was motivated by the opinion that "some of the information traveling over the Internet is tasteless, offensive, and downright spine-tingling." 141 Cong. Rec. S8345 (daily ed. June 14, 1995) (remarks of Sen. Biden). These statements by Congress demonstrate that the CDA imperils the "bedrock principle underlying the First Amendment"—"that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

In disregard of the facts and the law, the government attempts to characterize the CDA as a content-neutral

restriction on speech. The government argues that constitutional analysis of the CDA is controlled by this Court's two decisions concerning content-neutral zoning restrictions, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). Appellants' Brief at 18, 36-38. *Renton* and *Young* involved challenges by owners of adult movie theaters to zoning ordinances that restricted the permissible locations for such theaters. In those cases, the Court concluded that the legislative purpose did not concern the "content of adult films themselves," *Renton*, 475 U.S. at 47, or the "dissemination of 'offensive' speech," *Young*, 427 U.S. at 71 n.34 (plurality opinion). Rather, the record showed that the municipal governments were concerned with the "secondary effects" of the movie theaters, such as an increase in crime and a reduction in property values. *Renton*, 475 U.S. at 48; *Young*, 427 U.S. at 55. The Court reviewed the zoning ordinances in both cases under the less rigorous content-neutral test because the ordinances were designed to prevent these secondary effects, "not to suppress the expression of unpopular views." *Renton*, 475 U.S. at 48.

In contrast, the government here should have abandoned its "secondary effects" argument immediately after conceding that "it is true that the harm to children [that the CDA is designed to address] is a consequence of the indecent material and therefore could in a sense be viewed as a primary rather than a secondary effect." Appellants' Brief at 37. Instead, the government offers two purported "secondary effects" that actually underscore that the CDA is content-based. First, the government claims that the purpose of the CDA is to "ensur[e] that parents are not deterred from allowing their children to use the Internet." *Id.* But this is just another way of saying that the government is concerned about the *content* of the restricted speech. The government is assuming that parents will not allow their children to use the Internet because of the

purported harm caused by the *content* of indecent materials.

As its second attempt to convert the CDA into a content-neutral restriction, the government argues that "[b]ecause there is no First Amendment right to disseminate indecent material to children, however, the harmful effect of such materials on children is better understood as a secondary effect of constitutionally protected adult-to-adult communication." *Id.* at 37. Again, that argument ignores the dispositive and undisputed fact here: the CDA discriminates among fully protected speech based solely on its content. As explained above, such content-based discrimination threatens vital First Amendment values by distorting the national discourse. Moreover, the government's argument is inconsistent with *Sable*, where this Court applied strict scrutiny even though the government's interest was, as here, the protection of minors from indecent messages. 492 U.S. at 126.

The falseness of the analogy that the government draws between this case and the zoning cases is illuminated by constructing a true analogy. For *Renton* and *Young* to be like this case, the municipalities would have been focused instead on the purported harm caused to minors by exposure to adult films and would have banned the sale to minors of tickets for screenings at adult theaters. If the ban were limited to minors, such restrictions probably would be constitutional under *Ginsberg* and the municipalities would not have needed a "secondary effects" argument.[6] In turn, for this case to be like *Renton* and *Young*, the government would have passed the CDA to address harms caused by having a computer in the home, separate and apart from the content of materials available

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[6] On the other hand, if the ban on ticket sales were not limited to minors, such restrictions would be unconstitutional under *Butler* because, like the CDA, they would impermissibly restrict adults' rights.

on the computer. Obviously, that was not Congress's goal.

More troubling from the perspective of *amici*, the government's "secondary effects" argument, if successful, would have grave implications for the protection of any speech concerning activities in which adults, but not minors, may lawfully participate. For example, many would argue that minors do not have First Amendment rights to receive advertising messages concerning adult products or services, such as guns, tobacco products, promotional sweepstakes, Indian casinos, alcohol beverages, or many fee-based telephone services (such as "900" services). But, under the government's reasoning, as long as a legislature claimed to be restricting such advertisements in order to protect minors, it would be able to deprive adults of those messages, subject only to the limited constitutional protection afforded content-neutral restrictions on speech. The First Amendment's protection of truthful, nonmisleading advertising for lawful products and services must not be weakened by acceptance of the government's "secondary effects" argument in this case.

Try as it might, the government cannot escape the fact that the CDA is a content-based restriction on speech. For it to be upheld, the CDA must pass the strict scrutiny afforded fully protected speech. Anything less would threaten First Amendment rights in this and countless future cases involving the restriction of mature messages.

III. THE COURT'S DECISION IN THIS CASE SHOULD BE CAREFULLY CRAFTED SO AS TO NOT DIMINISH COMMERCIAL SPEECH RIGHTS

Regardless of the ultimate outcome of this case, a risk exists that any negative language limiting the First Amendment rights of appellees may have a spillover effect on the protection of non-indecent commercial speech. Government often asserts the same interest in cases involving

restrictions on advertising—the protection of children—that it uses to justify restrictions on indecent speech. The two areas, however, raise dissimilar issues of proof in two key respects.

First, whenever a content-based restriction on speech is challenged, the government must show that the speech in question actually causes the asserted harm and that its restriction will alleviate that harm. *See Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993); *Sable*, 492 U.S. at 126. Would-be censors of indecent speech argue, and many agree, that such speech harms immature minors immediately upon exposure. *See F.C.C. v. Pacifica Found.*, 438 U.S. 726, 746 n.23 (1978) (Stevens, J., concurring) ("Verbal or physical acts exposing those intimacies [*i.e.*, certain bodily functions] are offensive irrespective of any message that may accompany the exposure."); *id.* at 758 (Powell, J., concurring) (noting that indecedent speech "may have a deeper and more lasting negative effect on a child than on an adult").

In contrast, even the opponents of advertising for adult products cannot demonstrate any immediate impact on children, so they routinely assert an attenuated and unproven chain of presumptions, starting with exposure to the advertising, to recognition of likable symbols or figures, to creation of favorable attitudes, to stimulation of desire for the product, to illegal purchase or use outside the detection of parents.

Second, the deep differences between indecency and commercial speech are also critical to the First Amendment inquiry concerning the availability of non-speech-related alternatives to advance the government's asserted purpose. *See Edenfield*, 507 U.S. at 773; *Sable*, 492 U.S. at 114. The harm purportedly caused by indecent speech could perhaps most directly be addressed by restricting children's access to the immediately impactive speech itself, assuming that appropriate means to do so were available. In contrast, the harm purportedly caused by advertising for

adult products is much more directly addressed by non-speech-related alternatives to reduce access to, and use of, the products, such as better law enforcement, education and parental supervision. *See 44 Liquormart*, 116 S. Ct. at 1510 (Stevens, J.); *id.* at 1522 (O'Connor, J., concurring in the judgment); *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1593-94 (1995).

These divergent issues of proof raised by restrictions on indecency and commercial speech, *amici* respectfully submit, require this Court to be wary of making general statements in this case about government's ability to restrict speech in order to protect children. Specifically, if the Court chooses to rely on *Pacifica*, it should make clear that the factual basis of that decision was limited to the indecency context. In *Pacifica*, the Court upheld restrictions on the times during which radio broadcasts could include indecent speech. The Court based its analysis on the immediate harm caused to young children by exposure to indecent speech. As the Court noted, "to say that one may avoid further offense by turning off the radio when he hears indecent speech is like saying that the remedy for an assault is to run away after the first blow."[7] *Pacifica*, 438 U.S. at 748-49. In contrast, no one can claim that exposure to advertisements for adult products causes immediate harm. *Pacifica* would have been an entirely different case if the restricted speech were non-indecent advertisements for George Carlin's album or his performances.

The danger of *Pacifica* and other indecency cases being used to uphold restrictions on commercial speech is not merely hypothetical, as demonstrated by the Fourth Circuit's decision on remand in *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325 (4th Cir. 1996). That case in-

[7] Here, as the court below noted, presently available technology enables parents to protect children from that "first blow." J.S. App. 42a. This is one more reason why the CDA is not narrowly tailored.

volves a First Amendment challenge to a zoning ordinance that restricts the placement of truthful, nonmisleading outdoor advertisements for alcohol beverages. This Court vacated the Fourth Circuit's initial opinion upholding the ordinance and remanded the case for further consideration in light of *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996). *Anheuser-Bush, Inc. v. Schmoke*, 116 S. Ct. 1821 (1996). On remand, the previously unanimous panel split, but the majority again upheld the ordinance, mostly readopting its prior opinion with one significant addition. The majority stated that, even in the commercial speech context, this Court's indecency cases require that children be given "special solicitude in the First Amendment balance." 101 F.3d at 329 (*citing, inter alia, Pacifica, Denver Area, Ginsberg*, and *Osborn v. Ohio*, 495 U.S. 103 (1990)).

While there certainly are contexts in which government has a compelling interest in protecting children, the notion that First Amendment rights are somehow reduced when a government asserts that interest is troubling enough in the indecency context.[8] Extension of that notion to truthful, nonmisleading commercial speech for lawful products and services would reflect an impermissible undervaluing of the rights of advertisers and consumers. *Amici* respectfully urge the Court not to use language in deciding this case that may be construed as implying any greater latitude for government to restrict commercial speech rights when it invokes an interest in the protection of children.

[8] This is particularly so when, as here, indecency is defined so broadly as to include materials that do not appeal to the prurient interest and have serious literary, artistic, political and scientific value. *Shea*, 930 F. Supp. at 935 n.34 (citations omitted); *see* J.S. App. 70a-71a.

CONCLUSION

The CDA is a content-based restriction on fully protected speech. It is unconstitutional because the government has not satisfied the strict scrutiny that courts apply in reviewing such restrictions. The government cannot avoid that strict scrutiny by claiming that it designed the CDA to protect children. The decision of the district court should be affirmed. In any event, this Court's decision should be carefully crafted so as to not diminish commercial speech rights.

Respectfully submitted,

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